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No. 74-869

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED CONTINENTAL TUNA CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In our main brief we demonstrated that respondent's complaint against the United States was cognizable solely under the Public Vessels Act, 46 U.S.C. 781 *et seq.*, and that the district court properly dismissed the suit because respondent had failed to satisfy the reciprocity requirement of the Act (46 U.S.C. 785). Respondent now proffers as grounds for affirmance of the judgment of the court of ap-

peals, which reversed the district court's decision, contentions that were either rejected or not considered below. We briefly reply to these subsidiary contentions.

1. Respondent urges (Br. 5-10) the Court to abolish the doctrine of sovereign immunity. The doctrine that the United States may not be sued without its consent is, however, firmly embedded in our jurisprudence and has been consistently reaffirmed by this Court. *E.g.*, *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 141-142; *Honda* v. *Clark*, 386 U.S. 484; *Dugan* v. *Rank*, 372 U.S. 609. In any event, respondent's argument is irrelevant here, for Congress, by virtue of the Public Vessels Act, has placed express limits upon the jurisdiction of the federal courts to hear the type of suit brought by respondent, and respondent's suit falls outside those limits. Thus, respondent's suit is barred not by the broad doctrine of sovereign immunity as such but rather by a specific statutory jurisdictional limitation.

2. Respondent also argues (Br. 22-24) that, even if its suit is cognizable solely under the Public Vessels Act, it is in fact a national of the United States, rather than a "national of any foreign government," and therefore is not subject to the reciprocity requirement contained in that Act (46 U.S.C. 785). But respondent should not be permitted to challenge in this Court, for the first time, a factual premise

which it set forth in its complaint and upon which the parties and both courts below have proceeded.[1]

In its complaint, respondent expressly alleged that it was "a Philippine corporation" (A. 5). The settled rule is that "a corporation of a foreign State is, for purposes of jurisdiction in the courts of the United States, to be deemed, constructively, a citizen or subject of such State." *Steamship Co.* v. *Tugman*, 106 U.S. 118, 121.[2] Accordingly, respond-

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[1] Respondent did move in the district court to substitute as parties plaintiff certain individuals and corporations, allegedly its American shareholders, on the basis of the representation of its counsel that respondent had been dissolved and its assets distributed to its shareholders (A. 11-13). In the affidavit attached to the motion, respondent's counsel acknowledged that *respondent* was "a Philippine corporation" (A. 12). The district court denied the motion for substitution (A. 17), pointing out that, even if counsel's representations were true, respondent had no cause of action under the Public Vessels Act because it had failed to satisfy the reciprocity requirement and that dissolution of the corporation could not create a cause of action in the shareholders not possessed by the corporation (Pet. App. 14a-15a). The shareholders appealed from this ruling (Pet. App. 2a-3a), but the court of appeals affirmed (Pet. App. 8a). The shareholders did not seek certiorari.

Thus it is only in this Court that respondent has claimed that *it* has always been a national of the United States and not of the Philippines.

[2] As this Court observed in *Lauritzen* v. *Larsen*, 345 U.S. 571, 587, "it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries" (footnote omitted). As a result, in dealing with claims of injured seamen under the Jones Act, 46 U.S.C. 688, "our courts on occasion have

ent's allegation of incorporation in the Philippines constituted a concession of the fact of Philippine nationality. The district court's decision rested upon that allegation, and the court of appeals did not dispute the factual premise of that decision. Since the fact of Philippine nationality was uncontested in the courts below, litigation of that factual issue in this Court is inappropriate. Cf. *United States* v. *Reliable Transfer Co.*, No. 74-363, decided May 19, 1975, slip op. 5, n. 2; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.[3]

3. Finally, respondent contends (Br. 25-27) that even if its suit is cognizable solely under the Public Vessels Act and it is found to be a national of the Philippines, the suit nevertheless is not barred because the reciprocity requirement denies due process to Philippine nationals. Respondent did not make this contention in the district court, and we are advised by the government's appellate counsel that the

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pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them" (*ibid.*; footnote omitted). But while the liberal policies underlying the Jones Act have led courts occasionally to apply American law against American shipowners who have obtained foreign registration solely to escape the obligations imposed by that law, as in the cases cited by respondent (Br. 22-24), no court has ever permitted a foreign corporation to escape the jurisdictional requirements imposed by American law under the Public Vessels Act by shedding its foreign nationality when it might be to its benefit to do so. This is, apparently, what respondent wishes to do here.

[3] Moreover, respondent has never adduced any evidence in support of its eleventh-hour claim of American nationality.

court of appeals at oral argument refused to consider it for that reason. Since respondent's late-blooming constitutional claim, which relates to complex matters concerning the conduct of foreign affairs and the rights of nonresident aliens, was not made in the district court and was not considered by the court of appeals, and since it is one of first impression, this Court should follow its usual practice and decline to consider it. *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164; *Ramsey* v. *United Mine Workers*, 401 U.S. 302, 312.[4]

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[4] In any event, we believe that the statutory classification challenged by respondent has a rational basis, and is therefore constitutional, since it only discriminates against nationals of foreign countries that discriminate in the same manner against nationals of the United States.

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